



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 30, 1998

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711-7476

OR98-3299

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your tracking number for this request is TDA-OR-99-0009. Your request was assigned ID # 121228.

The Texas Department of Agriculture (the "Department") received a request for information relating to the security required of a grain warehouseman, the Department's policies and procedures concerning draws on the security, specific public grain warehouses licensed by the Department, grain transactions at those warehouses, correspondence, and other documents relating to those grain warehouses. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state that the Department has asked for clarification regarding some portions of the request, but, as of December 17, 1998, we have received no correspondence containing a clarification of the request. We assume that you wish to obtain a ruling on the request as it stands.

First, you assert that section 552.103 of the Government Code applies to except from disclosure all of the documents the Department submitted to this office. When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. To establish that litigation is reasonably anticipated, a governmental body must provide "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a

potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the fact that an individual hires an attorney who makes a request for information establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In this case, the Department has not met the burden of showing that it reasonably anticipates litigation. Therefore, the Department may not withhold the submitted documents under section 552.103 of the Government Code.

The Department contends that the five documents contained in Exhibit C and one document in Exhibit D, the two page e-mail from David Gipson, are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). Client communications to the attorney regarding the subject matter of the representation are privileged. *Id.* at 3. After reviewing the documents at issue, we agree that the documents contained in Exhibit C and the two page e-mail in Exhibit D may be withheld from disclosure under section 552.107(1).

The Department also contends that, as a copy of a document collection, Exhibit D constitutes attorney work product and should be excepted from disclosure under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney’s mental processes, conclusions and legal theories.

You state that the documents that you have marked as work product are a copy of a document collection that was created in anticipation of litigation. We have reviewed the

documents and the order in which they are placed. Two of the documents appear to have been created in anticipation of litigation in that, as part of the Department's enforcement authority, the documents were prepared in its investigation of possible violations of grain warehouse statutes by certain public grain warehouses. We have flagged these documents with red flags, stating "work product." You may withhold these documents from disclosure under section 552.111. We note that most of the documents in Exhibit D were neither created by the Department nor do they reflect an attorney's mental processes, conclusions, and legal theories. Thus, we conclude that, except for the e-mail from David Gipson to Dolores Hibbs dated June 28, 1998 and the two flagged documents, the Department must release the documents contained in Exhibit D.

Finally, the Department asserts that some of the requested information is confidential by law. Exhibit B contains a representative sample of this information.¹ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The Department regulates the licensure and operation of certain grain warehouses in Texas. Agric. Code § 14.003. You state that the information withheld by the Department in this request is made confidential by section 14.003(d) of the Agriculture Code. This section provides that

(d) The following information prepared by the department in the course of its regulatory authority under this subchapter or required to be submitted to the department in accordance with the department's administration of this subchapter is confidential and not subject to public disclosure:

- (1) inspection reports containing information regarding grain inventory; [and]
- (2) financial information provided to the department to establish net worth for purposes of licensure.

Agric. Code § 14.003(d). You state that the information withheld by the Department is financial information provided to the Department to establish net worth for purposes of licensure or is information related to grain inventories obtained from Department inspections.

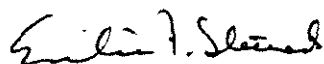
¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit a representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

After reviewing the documents at issue, we agree that the information contained in Exhibit B is confidential under section 14.003(d) and must be withheld.

In summary, you may withhold the documents contained in Exhibits B and C. You may also withhold the e-mail and two other red-flagged documents contained in Exhibit D, but you must release the remainder of the information contained in Exhibit D.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 121228

Enclosures: Submitted documents

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